

A Malayan Banking Bhd v PK Rajamani

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-181-1992
ABDUL HAMID OMAR LP, EDGAR JOSEPH JR AND MOHAMED
DZAIDDIN SCJJ

2 DECEMBER 1993

Land Law — Charge — Overdraft facilities secured by charge over land — Renewal of overdraft facilities which was to be secured by charge over land — Order for sale of land — Whether second overdraft facility was new facility without any security and therefore could not be enforced against land

Banking — Security for advances — Overdraft facilities secured by charge over land — Renewal of overdraft facilities which was to be secured by charge over land — Order for sale of land — Whether second overdraft facility was new facility without any security and therefore could not be enforced against land

On 4 April 1984, the appellant granted an overdraft facility of RM50,000 with interest at 9%pa to Sira Communications and General Contractor ('the borrower') to be secured by a first legal mortgage on the respondent's property ('the property'). On 10 April 1984, the respondent executed a first legal charge on the property. In October 1984, the borrower applied for and was granted by the appellant an additional facility of RM10,000, making a total of RM60,000 to be secured by a second legal charge on the property. By a letter dated 7 March 1986, the appellant informed the borrower that it had approved the renewal of its overdraft facility for RM60,000 which would carry an interest rate of 10%pa. The facility was to be secured by a first legal charge on the property.

In February 1987, the appellant's solicitors sent to the respondent a letter enclosing a letter of default informing him that he had failed to repay the outstanding overdraft. Subsequently the appellant's solicitors applied for an order of sale of the property. The High Court made such orders as requested. The respondent filed an application to set aside the order for sale. The respondent later raised a preliminary issue alleging that the renewal of the facility of RM60,000 had created a new facility because it contained new terms and was without any security. The learned judge of the High Court agreed with counsel for the respondent's submissions and set aside the order for sale. The appellants have appealed.

The issue before the court was whether the facility given in the letter of 7 March 1986 was a 'new' facility or a continuing facility secured by the existing charges.

Held, allowing the appeal:

(1) The trial judge had taken the wrong approach in arriving at his conclusion. The correct approach would be to look at the substance, not just the label which had been attached to the letter.

The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance. Looking at the substance of the matter, the property is still encumbered with the first and second legal charges and has remained so until today. Bearing in mind that the security for the new facility would be the first legal charge on the same property, it was imperative for the existing legal charges to be discharged before a fresh first legal charge was created. It is trite law that there cannot be a first legal charge on the property unless the title is free from earlier charges.

- (2) In the circumstances of the whole case, the facility of 7 March 1986 was a continuing facility and the security created by the first and second charges was a continuing security for which the appellant had rightly based its application for an order for sale under s 256 of the National Land Code 1965.

[Bahasa Malaysia summary]

Pada 4 April 1984, perayu telah memberi kemudahan overdraf sebanyak RM50,000 dengan faedah 9% setahun kepada Sira Communications and General Contractor ('peminjam') yang dijamin oleh gadai-janji pertama di sisi undang-undang atas hartanah responden ('hartanah itu'). Pada 10 April 1984, responden telah menyempurnakan gadaian pertama di sisi undang-undang atas harta itu. Dalam bulan Oktober 1984, peminjam telah memohon untuk dan telah diberi oleh perayu suatu kemudahan tambahan sebanyak RM10,000, menjadikan jumlahnya RM60,000 yang telah dijamin dengan gadaian kedua di sisi undang-undang atas harta itu. Melalui suatu surat bertarikh 7 Mac 1986, perayu telah memberitahu peminjam bahawa ia telah meluluskan pembaharuan kemudahan overdraf itu bagi jumlah RM60,000 yang dikenakan faedah pada kadar 10% setahun. Kemudahan itu hendaklah dijamin dengan gadaian pertama di sisi undang-undang atas hartanah itu.

Dalam bulan Februari 1987, peguamcara bagi pihak perayu telah menghantar kepada responden sepucuk surat yang dilampirkan dengan sepucuk surat ingkar memberitahunya bahawa beliau telah gagal membayar balik overdraf yang belum dijelaskan. Kemudiannya peguamcara pihak perayu telah memohon untuk suatu perintah jualan hartanah itu. Mahkamah Tinggi telah membuat perintah seperti yang dipohon. Responden telah memfailkan suatu permohonan untuk mengetepikan perintah jualan itu. Responden kemudiannya telah menimbulkan suatu isu permulaan dengan mendakwa bahawa pembaharuan kemudahan RM60,000 telah mewujudkan suatu kemudahan yang baru kerana ia mengandungi terma-terma baru dan adalah tanpa jaminan. Hakim Mahkamah Tinggi yang arif bersetuju dengan hujah peguam responden dan telah mengetepikan perintah jualan itu. Perayu telah membuat rayuan.

- A Isu di hadapan mahkamah adalah sama ada kemudahan yang telah diberikan di dalam surat 7 Mac 1986 itu merupakan suatu kemudahan yang 'baru' atau suatu kemudahan berlanjutan yang dicagar oleh gadaian yang wujud.
- B **Diputuskan**, membenarkan rayuan itu:
- (1) Hakim perbicaraan telah mengikut pendekatan yang salah apabila membuat keputusan beliau. Pendekatan yang wajar adalah supaya melihat isinya dan bukan hanya kepada label yang terkepil kepada surat itu. Undang-undang akan selalunya melihat disebalik istilah dokumen itu kepada fakta sebenarnya keadaan itu dan ia bukan lagi hanya soal mengenai ungkapan tetapi merupakan soal isi dokumen itu. Memandangkan isi perkara itu, hartanah itu masih lagi dibebani oleh gadaian pertama dan kedua di sisi undang-undang dan masih kekal sehingga ke hari ini. Memandangkan bahawa cagaran untuk kemudahan baru itu akan menjadi gadaian pertama di sisi undang-undang atas hartanah itu, adalah mustahak supaya gadaian di sisi undang-undang yang wujud itu dilepaskan sebelum suatu gadaian pertama di sisi undang-undang yang baru diwujudkan. Adalah merupakan undang-undang mantap bahawa tidak boleh terdapat suatu gadaian pertama di sisi undang-undang ke atas hartanah itu melainkan jika hakmilik itu adalah bebas daripada gadaian yang terdahulu.
- (2) Dalam keadaan keseluruhan kes ini, kemudahan yang diberi pada 7 Mac 1986 merupakan suatu kemudahan yang berterusan dan jaminan yang diwujudkan oleh gadaian pertama dan kedua merupakan jaminan berterusan di atas mana perayu dengan betul telah berdasarkan permohonannya untuk suatu perintah jualan di bawah s 256 Kanun Tanah Negara 1965.]
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Notes

For cases on securities for advances, see 1 *Mallal's Digest* paras 878–943.

G**Cases referred to**

- 1 *Woo Yew Chee v Yong Yong Hoo* [1979] 1 MLJ 131 (refd)
- 2 *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513; [1957] 3 All ER 563; [1957] 3 WLR 980 (refd)

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Appeal from: Originating Summons No S6–31–1058–87 (High Court, Kuala Lumpur)

Oon Lay Yean (Suhaimi Khor Zulkifli & Chang) for the appellant.
James Selva (James Selva & Co) for the respondent.

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Mohamed Dzaidin SCJ (delivering the grounds of decision of the court): This was an appeal from the decision of Anuar J given on 26 March 1992 setting aside the order for sale dated 15 February 1988 made under s 257

of the National Land Code 1956 ('the NLC') and the subsequent public auction fixed on 12 September 1990 in respect of the respondent's property, on which is situated a single storey terrace house, held under HS(D)22274, PT615, mukim Kuala Lumpur, daerah Kuala Lumpur ('the said property').

Background

On 4 April 1984, the appellant granted an overdraft facility of RM50,000 ('the first facility') with interest at 9%pa to Sira Communications and General Contractor ('the borrower'), a sole proprietorship firm carrying on business at No 272-1, Jalan Brickfields, Brickfields, Kuala Lumpur, to be secured by a first legal charge on the said property. In its letter of offer to the borrower, it was made known that the purpose of the loan was for use as a working capital and the loan was subject to a yearly review. On 10 April 1984, the respondent executed a first legal charge in Form 16A of the NLC together with an annexure containing the terms and conditions of the charge which was presented and registered at the Land Registry, Wilayah Persekutuan, on 17 May 1984.

It seemed that some time in October 1984, the borrower applied for and was granted by the appellant an additional facility of RM10,000 ('the second facility'), making a total loan of RM60,000 to be secured by a second legal charge on the said property. Except for the amount of the additional loan, a similar letter of offer containing similar terms and conditions as the first facility was sent to the borrower on 16 October 1984.

On 13 November 1984, the respondent executed another Form 16A and an annexure which was duly presented and registered at the Wilayah Land Registry on the following day.

Next, by a letter dated 7 March 1986, the appellant informed the borrower that the management had approved the renewal of its overdraft facility for RM60,000, which would carry an interest rate of 10%pa. The said facility was to be secured by a first legal charge on the said property and also subjected to yearly review and yearly re-auction of RM10,000 from 1 March 1987.

From the record, it would appear to us that by October 1986, the borrower had not been operating its account with the appellant satisfactorily. As the account remained overdrawn, the appellant must have decided to recall the facility and to foreclose on the said property. Hence, on 18 February 1987, the appellant's solicitors sent to the respondent a letter under AR registered cover, enclosing a notice of default in Form 16D informing him that he had committed a breach of the provision of the charge by not paying on demand the sum of RM61,565.75 being the outstanding overdraft as at 20 October 1986 together with interest at 10%pa on monthly rests. The respondent was then required to remedy the breach within 14 days from the date of the service of the aforesaid notice.

On 24 March 1987, the appellant's solicitors proceeded to file an originating summons under s 256 of the NLC applying for an order for sale of the said property. Consequently, on 15 February 1988, the High Court heard the originating summons and made orders in term of the originating

- A summons. This was followed by a summons for direction and the fixing of an auction sale on 12 September 1990.

Respondent's summons-in-chambers

- B On 11 December 1990, the respondent filed an application by summons-in-chambers, which was later amended, seeking an order that the order for sale dated 15 February 1988, the directions dated 12 August 1988 and the sale by public auction fixed on 12 September 1990 be set aside. The hearing of the application commenced on 2 October 1991. However, at the continued hearing on 26 March 1992, counsel for the respondent raised a preliminary issue on the letter dated 7 March 1986 granting the renewal of facility of RM60,000 to the customer. The relevant text of the letter states as follows:

Messrs Sira Communications and General Contractors
272-1, Jalan Brickfields
Brickfields
D Kuala Lumpur

Dear Sirs,

Re : Our AA 86/45
OD RM60,000
Renewal of facility

- E We refer to the above and are pleased to advise that our management have approved the renewal of your OD facility subject to our terms and conditions as follows:

Facility and limit: OD RM60,000

- F Interest rate : 10%pa
Interest rate variable at the bank's sole discretion.

Purpose : As working capital

Security : By first legal charge for RM60,000 on property held under freehold HS(D)22274 PT615 mukim/district of KL.

Repayment : Yearly review and yearly reduction of RM10,000 with effect from 1 March 1987.

- G (All banking facilities are subjected to be recalled by the bank at any time as it deems fit).

- H Based on the above letter, it was counsel's submission that it created a new facility because it contained new terms on the rate of interest and the security. Counsel contended that the earlier facilities granted on 4 April and 16 October 1984 for a total sum of RM60,000 had expired and been replaced by this new facility. The appellant had also admitted in its affidavit that this was a new facility. So, the upshot of counsel's argument was that as this was a new facility without any security, the appellant could not enforce it against the said property, being the security for the expired facilities.

- I Counsel for the appellant, in her reply, relied on cll 6 and 28 of the annexure of the charge, which stipulated that the security under the charge was a continuing security and that the bank could vary or increase the

facility at any time without affecting the security thereby created. In short, the aforesaid letter created a continuing overdraft facility granted to the borrower. A

Decision

The learned judge agreed with counsel for the respondent's submission and on that score he allowed the application and set aside the order for sale, the directions and the auction of the said property. In his brief grounds of decision in Bahasa Melayu, the learned judge stated, inter alia, as follows: B

It is clear from the plaintiff's affidavits (encls 42 and 46) that the facilities given by the letters of offer dated 4 April 1984 and 16 October 1984 were accepted as the 'old facilities'. The plaintiff then admitted that it gave a 'new' facility by its letter dated 7 March 1986, whereby it agreed to grant to the borrower an overdraft facility for RM60,000. This letter also contained a different rate of interest. C

Therefore, what is clear to me is the fact that the plaintiff based its claim on an overdraft facility which it agreed in the letter of 7 March 1986 and not based on the two 1984 letters of offer. However, the plaintiff's application in encl (1) shows that it is suing on the securities executed in 1984. In my opinion, the plaintiff's claim is not valid because the securities executed in 1984 have expired. D

I agree with the submissions of counsel for the defendant that the plaintiff has no right to make its claim based on the old securities which have expired. Such securities cannot found a claim for the new facility. E

Issue before the court

On 15 November 1993, we heard this appeal. The issue before us was simply this: Was the facility given in the letter of 7 March 1986 a 'new' facility or a continuing facility secured by the existing charges? After hearing counsel, we decided to disagree with the learned judge that the facility given in the letter of 7 March 1986 was a 'new' facility. We said that it was a continuing facility. So, we allowed the appeal with costs and indicated that we would give our reasons, which we do so now. F

In our view, the learned judge had taken a wrong approach in arriving at his conclusion that the facility given in the letter of 7 March 1986 was a new facility. We think he had been influenced by the contents of the letter and the admission by the appellant that it was a new facility. It is true the said letter described the facility as a 'renewal of facility'. It may also be true that the appellant had admitted that it had granted to the borrower a new facility of RM60,000 subject to its terms and conditions mentioned therein. We also do not dispute that the prescribed rate of interest is 10%pa, and therefore different from the first and second facilities of 9%pa. However, it does not necessarily follow from these facts that the said letter creates a new facility. In our view, the correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance (see *Woo Yew Chee v Yong Yong Hoo*;¹ and *Addiscombe Garden Estates Ltd v Crabbe*²). G
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- A Looking at the substance of the matter, by which we mean the whole loan transaction, the first thing which strikes us is that the said property is still encumbered with the first and second legal charges and has remained so until today. The first and second facilities were granted on 4 April and 16 October 1984 respectively, which were secured by the aforesaid charges.
- B Bearing in mind that the security for the new facility would be the first legal charge on the same property, it is imperative for the existing legal charges to be discharged before a fresh first legal charge is created. It is trite law that there cannot be a first legal charge on a property unless the title is free from all earlier charges. In the instant case, there has to be a discharge of charge of the said property. Alternatively, the said letter should stipulate under
- C 'security' a condition that there should be a discharge of charge of the said property before a fresh first legal charge is created. Yet, we find nothing was mentioned in the said letter. In practice, it is not uncommon for financial institutions to specify a such condition in the letter of offer granting loans to their customers. Therefore, in view of the existing first and second legal charges registered on the said property, it was wrong for the learned judge
- D to have held that the earlier securities had expired. In our view, the two charges, being security for the earlier facilities, are still valid because of what is stipulated in cl 6 of the annexure to the charges. It states that the security created by the charge is expressly intended to be and shall be a continuing security for all moneys whatsoever now or hereafter from time to time
- E owing to the bank by the customer.

- Secondly, looking at the bank account of the borrower, it is perhaps pertinent to ask: What happened to the outstanding debt under the first and second facilities and why was the appellant enforcing the debt under, what the learned judge has held to be, the 'new' facility without the borrower making full payment of the outstanding loan? Looking at the statement of
- F account of the borrower (at p 243 of the appeal record), it would appear to us that the outstanding loan as at the date of the 'new' facility was RM43,604.52. There was no evidence to show that this amount has been paid or written off by the appellant and replaced by a fresh facility of RM60,000. It should also be remembered that the borrower had been at
- G some stage or another a 'bad' customer of the appellant, in the sense that its cheques were dishonoured and its account was not properly maintained. However, to say the least, it would be commercially imprudent, aside from incurring the wrath of Bank Negara, for the appellant, for no apparent or valid reason, to write off such a substantial debt of RM43,604.52. Therefore,
- H as the sum of RM43,604.52 was still due and owing by the borrower to the appellant on the date of the granting of the renewal of facility of RM60,000, coupled with our observations stated above, we are of the view that the earlier facilities have not expired, but which the appellant had intended by the later facility of 7 March 1986 to be a continuing facility. This conclusion is supported by cl 28 of the annexure which states that the bank may at any
- I time and without in any way affecting the security created, inter alia, determine, vary or increase any credit or other facility granted to the customer without affecting the existing security which is intended to be and

shall be a continuing security for all moneys owing to the bank. It can, therefore, be reasonably concluded that the appellant must have this provision in mind when its management agreed to grant to the borrower a 'renewal of facility' for RM60,000 on 7 March 1986.

Conclusion

In the circumstances of the whole case and for the above reasons, we came to our conclusion that the facility of 7 March 1986 was a continuing facility and the security created by the first and second charges was a continuing security for which the appellant had rightly based its application for an order for sale under s 256 of the NLC.

As we allowed this appeal with costs, we remitted the case to the court below for an early trial before another judge to hear full arguments on the remaining issues of the respondent's application. We also ordered that the deposit be refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim

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